No. 85

October Term, 1946

IN THE

Supreme Court of the United States

THE TRAILMOBILE COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-CIO,

Petitioners,

v.

LAWRENCE WHIRLS,

Respondent.

BRIEF ON THE MERITS ON BEHALF OF THE TRAILMOBILE COMPANY, PETITIONER

MORRISON R. WAITE,
PHILIP J. SCHNEIDER,
1318 Union Central Life Bldg.,
Cincinnati 2, Ohio,
Counsel for Petitioner,
THE TRAILMOBILE COMPANY

WAITE, SCHNEIDER & BAYLESS,
HERMAN A. BAYLESS,
HERBERT SHAFFER,
JOHN R. JOHNSTON,
1318 Union Central Life Bldg.,
Cincinnati 2, Ohio,
Of Counsel for THE TRAILMOBILE COMPANY, *Petitioner*

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I. OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of Ohio is not reported. The Court's findings of fact appear at R. 63, the Court's conclusions of law at R. 65 (64 Fed. Supp. 713), and the Judgment Entry at R. 67 (R. refers to pages of printed record herein).

The Opinion of the United States Circuit Court of Appeals, Sixth Circuit, is reported in 154 Fed. (2d) 866, and R. 70.

II. JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 5, 1946 (R. 70). The petition for a writ of certiorari was filed on April 11, 1946, and granted on June 10, 1946, 66 Sup. Ct. Rep. 1364; 90 Sup. Ct. L. Ed. 1260. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

The jurisdiction of the United States District Court which rendered the judgment from which the Appeal was taken was conferred by Section 8(e) of the Selective Training and Service Act of 1940, as amended. (USCA, Title 50, App. § 308; c. 720, § 8, 54 Stat. 890, as amended July 28, 1942, c. 529, § 2, 56 Stat. 724, as amended Dec. 8, 1944, c. 548, § 1, 58 Stat. 798).

III. QUESTION PRESENTED

Whether subdivisions (b) and (c) of Section 8 of the Selective Training and Service Act of 1940, as amended, give to a War Veteran who was restored to the position of employment occupied by him prior to his military service without loss of seniority, and who was continuously so employed for more than one year, the right to retain the seniority status held by him when he entered the service after that one year reemployment period and "as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company" notwithstanding the fact that his union after one year of reemployment, through collective bargaining, made a new labor contract which changed the seniority provisions of the employment contract.[1]

[1] The changed seniority provision, made after the employee was reemployed for a full year, was due to the fact that the parent corporation purchased the assets of its subsidiary corporation; the employees changed union affiliation; and the employees of the subsidiary were held to be new employees of the parent by the newly certified union, which the Ohio courts held they had a right to do (R. 52, 55).

IV. STATUTE INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, are set out in the Appendix, pp. 22 and 23.

V. STATEMENT OF CASE

The facts were stipulated to the Trial Court (R. 1-55).

Respondent, Lawrence Whirls, on February 8, 1935, was employed as a painter in the Paint Department by The Highland Body Manufacturing Company (hereinafter called Highland), a wholly owned subsidiary of The Trailmobile Company (hereinafter called Trailmobile). He worked continuously for Highland until he entered the Armed Forces of the United States, on October 23, 942. Thereafter he was honorably discharged, and upon application made was reemployed as a painter by Highland on May 3, 1943. Upon reemployment he was placed on Highland's seniority list as of date of hiring, February 8, 1935. His status and pay were not reduced while he continued to work for that company. On December 31, 1943, Highland was dissolved. All of its assets were sold to Trailmobile, which assumed all of the obligations of Highland, and on January 1, 1944, together with all other Highland employees, Whirls was placed on the payroll of Trailmobile. Although he had never been on the payroll of Trailmobile before, he was placed on the seniority list as of date of hiring with Highland, to-wit, February 8, 1935 pursuant to a previous ruling of the AFL union at a time when it represented the employees of both companies. He was employed in the Paint Department of Trailmobile, so that his status was unchanged. His pay was the same or greater than it had been with Highland. More than 14 months after his reemployment as above stated, to wit, on July 15, 1944, Trailmobile, his new employer, as a result of collective bar-

gaining with the newly N. L. R. B.-certified CIO Union, entered into a contract whereby his seniority was changed from February 8, 1935, to January 1, 1944. This change in seniority was likewise applicable to all other former Highland employees who were entered on the Trailmobile payroll on January 1, 1944.[2]

His status and pay are concededly not issues in this case. His claim to seniority is the issue involved here.

When Whirls was inducted into the Armed Forces he was working under a labor union agreement (Exhibit "C," R. 21), by which seniority was to be determined from the last date of hiring with Highland. His seniority was on a departmental basis and the contract provided that upon a permanent transfer, the transferred employee became junior to all the other employees in the new department. Previous to December 31, 1943, and pursuant to the then contract, employees who voluntarily transferred from Highland to Trailmobile were placed at the bottom of the Trailmobile seniority list in the department to which transferred.

Contracts were entered into bi-annually or annually between the employees' union and the company. Prior to 1943 the employees were represented by the AFL union, but during 1943, after a National Labor Relations Board

[2] Because of the seniority provision of the 1944 contract, one Louis J. Hess filed a representative suit in the Common Pleas Court of Hamilton County, Ohio, to determine the right of the company and the union to fix seniority for all Highland employees as of January 1, 1944. The suit was on behalf of Hess and all other former Highland employees, *naming Whirls as a then employee*, and one on whose behalf the suit was filed. The Courts of Ohio finally determined that the Company and the Union acted within their lawful rights by treating the former Highland employees as new employees of Trailmobile as of January 1, 1944 (R. 52, 53). Whirls had been reemployed following his service with the Armed Forces more than a year when this case was filed and thereafter decided. Herein Petitioner is named The Trailmobile Company, which name was changed in 1944 from The Trailer Company of America (R. 72, note) and R. 61). The opinion of the Common Pleas court is reported in 31 O. O. 566; Court of Appeals' affirmance and findings, R. 54; Motion to certify record to Ohio Supreme Court overruled, 31 O. Law Rep. 54; October 15, 1945, issue, also October 15, 1945, Vol. 18, issue of "Ohio Bar Association Reports," at page 314. Neither O. Law Rep. nor Ohio Bar Association Reports are published in bound editions, and the ruling appears only in the foregoing publications.

election, representation was changed by the vote of the employees from the AFL to the CIO. The CIO was the certified bargaining agent when the contract of June 21, 1944 (R. 41), and the contract of 1945 (Ex. "D," R. 23),[3] were consummated. Under the terms of the 1944 contract, Whirls did not have to become a member of the CIO union, but under the terms of the 1945 contract with the CIO, Whirls, and all other former Highland employees, had to become members of the CIO union under the closed shop provision of that contract, and he was a member of that union at the time this suit was filed below.

Respondent, Whirls, filed suit through the United States District Attorney in the United States District Court, Southern District of Ohio, and based upon the foregoing facts, the Trial Court found the issues in favor of respondent and ordered respondent restored to his seniority as it existed at the time he entered the military service (R. 63, 67).

The judgment was appealed to the United States Circuit Court of Appeals for the Sixth Circuit, which court, inter alia, found (R. 70) that respondent's seniority was fixed as of the date he entered the military service and "as long as the Act remains in force and as long as Whirls remains in the service of the appellant company" (R. 81) and affirmed the District Court.

VI. SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that § 8 (b) and (c) of the Selective Training and Service Act of 1940 entitled respondent to seniority

[3] These contracts, that of 1944 (R. 43) Section 4, Factor A, and that of 1945 (Exhibit "D," R. 23) Article VIII, Section 1, provide that seniority "shall date from employee's length of service with this company." The 1944 contract was executed July 15, 1944, as of June 21, 1944 (R. 49, Paragraph 5), which paragraph shows that pursuant to CIO demand and through collective bargaining, Highland employees were placed on seniority list as of January 1, 1944, the date of their hiring with Trailmobile.

as it existed at the time he was inducted into the armed forces, "as long as the Act remains in effect and as long as Whirls remained in the service of the appellant company."

2. In holding that appellants did not have the right to bargain collectively under the National Labor Relations Act after the completion of one year's reemployment and thereby change his (and all others similarly situated) seniority status.

VII. SUMMARY OF ARGUMENT

A. The pertinent provisions of Section 8 of the Act do not grant seniority other or different than the seniority which the veteran would have had if he had not gone into the military service. The Act provides that the veteran shall be restored to a position of like seniority, that he shall be restored without a loss of seniority, and that during the veteran's period of military service he shall be considered by the employer as on furlough or leave of absence. The Act further provides that the veteran shall not be discharged without cause for the period of one year from reemployment.

Respondent, Whirls, was reemployed following honorable discharge, by Highland, his original employer, and a wholly owned subsidiary of Trailmobile, on May 3, 1943. He was then given the same job he had when he left for the service and was then given seniority as of February 8, 1935, his original date of employment. That employer was dissolved on December 31, 1943. On January 1, 1944, he was employed by Trailmobile, the purchaser of all of the assets of Highland, which purchaser likewise assumed all of the obligations of the dissolved corporation. In his new position he was continued with a seniority rating as of February 8, 1935, the date of hiring with the dissolved corporation, until July 15, 1944. During this period of over fourteen

months, his seniority, status, and pay remained unchanged. On July 15, 1944, the new employer as a result of collective bargaining with the duly certified collective bargaining agent for its employees, including respondent, changed his seniority to January 1, 1944, the date he was entered on the payroll of the new employer.

The Court of Appeals erroneously ruled that seniority was fixed as that of the date he entered the military service, and could not thereafter be changed "as long as the veteran remained in the employ of the company and as long as the Act remained in effect," and that the employer and the employees' bargaining agent could not, as a result of collective bargaining, change his seniority so that Whirls must be restored to February 8, 1935, seniority. This ruling was erroneous because the Act at most guaranteed the veteran rights for a period of not to exceed one year from the date of reemployment. At the end of that one year period the veterans' rights revert to and are derived from the National Labor Relations Act and collective bargaining.

Fishgold v. *Sullivan Drydock & Repair Corp.*, No. 970, October term, 1945, decided May 27, 1946, 66 Sup. Ct. Rep. 1105 held that Congress did not intend to give veterans greater rights than they would have had if they had not gone into the service. On the other hand, Congress intended to restore the veteran upon reemployment, to all of the rights he would have had if he had not gone into the service. The ruling of the Circuit Court of Appeals gives this veteran a greater right than he would have had if he had not gone into the service, because all of his fellow workmen who were similarly situated and who did not go into the service now have seniority as of January 1, 1944. The Courts of Ohio approved the collective bargaining contract which provided for former Highland employees' seniority as of January 1, 1944, the date they were entered on the payroll of Trailmobile, the new employer.

B. Seniority is not an inherent right of employment, but is a right pursuant to contract. Congress recognizes that seniority is a right, but does not set up any new or different seniority provisions than exist between the employees and the employer.

C. Chaotic conditions result in this plant because of the decision of the Circuit Court of Appeals, which gives this veteran greater seniority than a large number of his fellow workers.

Chaotic conditions will prevail generally if veterans are given different seniority than the seniority provided for in collective bargaining agreements entered into from time to time following demobilization and into the future.

D. The intent and purpose of the Act would be defeated by an affirmance of the lower court's decision because it would be necessary to discharge an employee after his one year of reemployment in order to prevent inequality among employees if he contended for the seniority he had when he entered the military service, notwithstanding the change of seniority provisions through collective bargaining after his one year of reemployment.

VIII. ARGUMENT

It is stipulated that respondent's status and pay are not in issue herein. It is further stipulated that his seniority was not changed from May 3, 1943 (the date of respondent's reemployment) until July 15, 1944, by either Highland or Trailmobile. On July 15, 1944, when the union contract was executed between the CIO and Trailmobile, his seniority was changed, as was the seniority of all other former Highland employees, to January 1, 1944, the date he was entered on the payroll of Trailmobile.

The only two paragraphs of the Selective Training and Service Act, as amended, in issue in this case are as follows:

"(b) (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;"

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

A. Analysis of Paragraphs (b) (B) and (c) of the Act

Since the Court of Appeals, in its decision, and the Solicitor General, in his Memorandum filed with this Court, seem confused as to the intent and meaning, as well as the actual wording of the above two paragraphs of the Act, the words and phrases thereof should be analyzed in detail.

Paragraph (b) (B) provides:

"... a private employer ... : shall restore such person (veteran) to *such* position *or* to a position of like seniority, status, and pay *unless* the employer's circumstances have so changed as to make it *impossible* or unreasonable to do so."[1]

[1] All emphasis and parentheses supplied where the provisions of the Act are quoted.

In this case Whirls was restored to *such* position by his employer. He had been a painter and was reemployed as a painter in the same paint department. There he was continued during the existence of his employer, from the date of reemployment, May 3, 1943, until December 31, 1943, when his then employer was legally dissolved. Thereafter, he could not continue for that employer because it had been dissolved and was no longer in existence. Notwithstanding the dissolution of his employer, he did not lose employment. Because the plant of his first employer was abandoned, he was moved to the plant of his new employer and continued in the paint department of the new employer at the new location with "*a position of like seniority, status, and pay.*" This condition continued from January 1, 1944, until July 15, 1944, and therefore continued more than one year beyond May 3, 1943 (date of reemployment). So that between the two employers he was *restored to such position AND to a position of like seniority, status, and pay* during more than one full year after reemployment, thus this part of the Act was fully complied with.

This paragraph (B) does not guarantee any length of time for seniority, status, or pay. Certainly it could not be successfully argued that it guarantees permanent or fixed status and permanent or fixed pay "as long as he remains in the service of the employer and as long as the Act remains in effect." How, then, can it be argued that this paragraph of the Act is different as to seniority? We contend that it is not different and that the Court below erred in finding that the Act guaranteed Whirls permanent or fixed seniority "as long as he remains in the service of the employer and as long as the Act remains in effect." In other words, under the terms of this particular paragraph, after the employee has been restored to *such posi-*

tion or to a *position of like seniority, status, and pay*, there is no statutory prohibition against the employer doing with such employee as circumstances then might require. His status could be changed, his pay could be changed, and so could his seniority without any violation of this paragraph (b) (B).

Without resorting to the last provision of (c), there would be no guarantee of *seniority* nor *status* nor *pay* for any length of time, but the last provision of (c) should and by construction has properly and repeatedly been held to fix status, and pay for a period of one year after such restoration, unless the veteran is discharged for cause.

Since paragraph (B) does not give Whirls what he contends for here, we must look at (c) to determine whether or not that part of the Act does give him what is contended for by Whirls, and which contention was upheld by the Courts below, to-wit: Permanent or fixed seniority that existed on date of induction with the armed forces.

(c) provides that the veteran

> "... *shall be considered* as having been on *furlough or leave of absence*, during his period of active military service, ..."

This does not imply the permanent fixing of seniority. No non-veteran employee *on furlough or leave of absence* could successfully contend about a subsequent change if, after his return to work, his employer's circumstances changed so that his services, status, or pay, or even his seniority was changed through collective bargaining with the collective bargaining agent. Here Whirls, upon his return and reemployment, was treated as though he had been *on furlough or leave of absence* because he was given his former job, former status, and former pay, and it was not until more than fourteen months after he returned from his furlough or leave of absence that his seniority but not his status and pay, was changed.

Then paragraph (c) continues:

"... shall be *so* restored *without loss* of seniority, ..."

At the expense of repetition, we say and it is conceded, that he was *so* restored *without loss* of seniority upon his return. This clause does not guarantee, either directly or indirectly, against any *subsequent* change which might occur, and particularly when it did occur through collective bargaining as provided by the National Labor Relations Act. Since he was "so restored without loss," therefore this provision of the Act was complied with. Upon restoration, there was no "loss of seniority" and he continued in his former seniority position for more than fourteen months after such restoration.

Respondent stipulates that he was "restored without loss" but contends that the word "so" preceding the word "restored" refers to and requires a construction that whatever seniority he had upon entering the military service is thereafter fixed as long as he remains in the employ of the employer and as long as the Act remains in effect. This is a strained, if not ridiculous, contention.

The words "without loss of seniority" are preceded by the words "so restored" and qualify and limit the application of the words "without loss of seniority" to the time implied in the words "so restored." There is no express provision of the Act fixing any seniority rights of the returning veteran, after such restoration, as of any later definite or determinable date, or so long as the Act remains in effect, or so long as the returning veteran remains in the service of his employer, unless it be the one-year provision which was fully complied with in this case. There is nothing in the Act which necessarily or reasonably intends or implies such broad, indefinite, and comprehensive periods of time, after the restoration of his position, as was held by the courts below.

The next clause of (c):

> ". . ., shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees *on furlough or leave of absence* in effect with the employer at the time such person was ordered into such service, . . ."

There is no issue in this case regarding insurance or other benefits, neither is there any claim that he was entitled to anything under this particular clause of the statute. It is a complete clause, as shown above, within commas. However, it is significant to note that the Act gives the veteran the right to participate in insurance or other benefits offered by the employer, which the employee would have been entitled to *had he been on furlough or leave of absence*. In other words, it is again clear that the Congress intended that the veteran be restored to the exact "*position which he left, plus accumulated seniority.*"[3] *Fishgold v. Sullivan Drydock & Repair Corp.*, No. 970, October 1945 term, 66 Sup. Ct. Rep. 1105. This Court likewise held in that case:

> "But we would distort the language of these provisions if we read it as granting the veteran *an increase in seniority over what he would have had if he had never entered the armed services.*"

and again:

> "What it undertook to do was to give the veteran protection *within the framework of the seniority system*, plus a guarantee against demotion or termination of the employment relationship without cause *for a year.*"

[3] Emph. is supplied in all quotations from the *Fishgold* case.

Certainly this clause of (c), neither separately nor in conjunction with any of the other clauses of the Act, gives additional rights to the veteran which he would not have had if he had not entered the armed services. As to that point this Court said, "No step-up or gain in priority can be fairly implied." To fix seniority for duration of employment or the Act that of date of entering the military service would definitely give him "gain in priority" over that of his fellow workers, because he would have a different and greater seniority than others under the new collective bargaining agreement.

Lastly and for the first and only time in the Act (c) concludes:

> ". . . , and shall not be discharged from *such* position without cause within one year after *such* restoration."

Even if this clause guarantees the returned veteran's seniority position in the "seniority system" as of the date of induction, it does so for a period of one year and one year only. After the end of that one year the employee's rights revert to the protection afforded by the N. L. R. A. and the guaranteed right of collective bargaining.

Without the Act an employee leaving the employment of the employer for any reason, including joining the armed forces of the United States, would have lost his job and his seniority status. Upon discharge from the armed forces, he would have been a new employee of the company with seniority as of that date of hiring. The purpose of the Act, we submit, was to prevent such a result. And this court so held by saying in the *Fishgold* case:

> "Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority *means no more*.

> "Nor can we read into the guarantee against discharge 'from such position' a gain or step-up in seniority. *That guarantee does not in terms deal with the seniority problem. The problem of seniority is covered by the preceding provisions. . . .* But the guarantee against discharge does not on its face suggest the *grant of a preference* to the veteran over and above that which was accorded by the seniority of 'such position.'"

The Act does not in words or by implication guarantee seniority for any period of time, but provides that the employee shall be restored by the employer without loss of seniority and "shall not be discharged from such position without cause within one year after such restoration." There being no guarantee of employment longer than one year, there could not, therefore, be a continuing guarantee of seniority for a period longer than that one year. Thereafter, such employee's rights of employment were and are protected by the National Labor Relations Act and collective bargaining rights thereunder.

From the detailed analysis of the clauses of paragraphs (B) and (c), we submit that it is perfectly clear that the Congress neither directly nor indirectly intended to add rights for the veteran which he would not have had if he had not gone into the military service, but did intend to "*give the veteran protection within the framework of the seniority system, plus a guarantee against demotion or termination of the employment relationship without cause for a year.*" *Fishgold* case, supra.

Contrary to the Solicitor General's argument at Memorandum, p. 6, and to the lower Court's decision, seniority is not a "benefit separate and distinct from the other benefits conferred by" the Act. It is certainly not separate and distinct from *status* and *pay* in the Act. Would he argue that *status* and *pay* are fixed as of the date of induction and could not be changed *after* one year's re-employ-

ment? Even if the Court below and the argument at page 7 are correct, that the Act takes precedence over the Wagner Act, it could only do so for a period of one year. Thereafter, the benefit of the Act expires as to that veteran and the Wagner Act would stand alone as the employee's protection. And even if the collective bargaining agency could not bargain away rights under the Selective Training and Service Act, that restriction would last for only one year. Here we are not concerned with what would happen DURING the one year from reemployment, but solely with the question as to the veteran's rights under the Act AFTER that one year.

The Solicitor General (Memorandum p. 6) misconstrued the meaning of the quotation from the *Fishgold* case as applied to the facts of this case. We contend here that "He steps back on (the seniority system) at the precise point he would have occupied had he kept his position continuously during the War."[8] We contend that the agreements between the employer and the CIO union do not cut down the service adjustment benefits which Congress secured to the veteran under the Act. Therefore, the decision of this court, that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act," is not applicable to this case because the "agreement" was made after the one year of reemployment.

We submit that the Court below misconstrued the intent and meaning of the Act and gave added rights to Whirls which the Congress did not intend; that the Act should be construed in accordance with its meaning and in accordance with this court's decision in the *Fishgold* case.

[8] Quotation from *Fishgold* decision used by Solicitor General.

B. Seniority Is Not an Inherent Right of Employment

Under the law of Ohio and quite generally, seniority is not now nor has it ever been an inherent right of employment nor an unchangeable right. The weight of authority in this country is that seniority is not an inherent right of employment but is a matter of contract. The courts of Ohio finally determined this point in the *Hess* v. *Trailmobile* case (R. 54-55), wherein Whirls was *named* as one of those similarly situated with Hess and wherein the courts held:

> "2. Seniority rights are rights arising out of the contract between defendant employer and its employees represented by the defendant union . . . and such seniority rights can not arise merely by reason of the fact that an employee has worked for an employer for a number of years, unless the employer and the employee have so contracted" (R. 54).

Thus, and as is frequently done through collective bargaining, seniority rights are changed from time to time. It is a commonly known fact that from year to year labor contracts change seniority from a plant-wide to a departmental basis and back again with innumerable refinements and interpretations which affect great numbers of employees.

The *Hess* v. *Trailmobile* case finally determined a lawful "seniority system" for Trailmobile. Below we contended that the *Hess* case was res adjudicata of the issue herein presented. That court found against us on that issue and as the Attorney General comments on Memorandum, p. 5, the issue is not raised in this court. However, we submit that the courts of Ohio held against there being discrimination as to the former Highland employees, and that case does establish the law as to that point. Since Whirls was employed for more than one year before the collective bargaining agreement was changed to affect his seniority, we

submit that Whirls was in no better position than any non-veteran employee at the time of the change in the collective bargaining agreement, and that there could be no discrimination under the decisions of the Ohio courts, Whirl's one-year guaranteed reemployment status having been complied with.

Since seniority is not an inherent right of employment; and since there was no discrimination, Whirls could not inject such an issue here at this late date, as the Solicitor General seems to attempt in his Memorandum, toward the bottom of page 7. Furthermore, since the Act does not create a new seniority system, his protection is under the N. L. R. A. and collective bargaining.

By the foregoing argument we do not imply that there is no such thing as a seniority system or rights. As this court said in the *Fishgold* case,

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is, indeed, no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system, plus a guarantee against demotion or termination of the employment relationship without cause *for a year.*"

Thus our contention is that the seniority system is one of contract and the rights to seniority are derived from contracts. The Act did not protect the veteran beyond the year, consequently his rights are, after that one year, under the contracts which the company negotiates with the collective bargaining agency of the employees under the N. L. R. A. Since seniority is not an inherent right; it can only confer upon employees such rights as the collective bargaining agreement provides, so that Whirls is only entitled to seniority as of January 1, 1944.

C. Chaotic Labor Conditions Will Result if the Court Below Is Affirmed

The immediate effect of the decision of the lower courts in this particular plant is that it elevates a small number (approximately forty) of former Highland veterans on the seniority ladder above a large number (approximately 400) of Trailmobile veterans. It also raises these forty former Highland veterans above all of the former Highland non-veterans, since the latter's seniority status has been approved by the Ohio courts as of January 1, 1944. Furthermore, these forty former Highland veterans are placed above the large majority of the Trailmobile non-veterans who were employees of The Trailmobile Company, a younger and more rapidly expanding company than was the Highland Company. Following the decision below labor strife became so intense that Trailmobile, in order to avoid a strike, filed a Declaratory Judgment suit in the United States District Court to determine the seniority rights of all the various classes of veteran and non-veteran employees and seeking to enjoin the Selective Service System, the United States District Attorney, the Union, and all the employees from taking any action until the question was finally determined. That case is now pending before the United States Circuit Court of Appeals on the issue as to whether or not the court has jurisdiction over a Declaratory Judgment suit which raises questions involving the Selective Training and Service Act.

The effect of the decision of the Court below, from the broad viewpoint of all employers, would be that veterans' seniority would be fixed as of the date they entered the military service. Since men were inducted into the military service over a period of four years, it is probable that returned veterans in one plant would have different seniority each from the other, depending upon date of induction and

depending upon changes of seniority provisions in succeeding contracts. They might have left employment "on furlough" for military service under a contract providing for plant-wide seniority, then, after one year's reemployment during the course of years, the majority of a particular veteran's fellow-employees might desire and get a change of seniority from plant-wide to departmental or vice versa, and, notwithstanding that such majority was made up of fellow veterans, any single veteran could say, "No, I have a guaranteed fixed seniority as of the date I entered the service." The chaotic conditions resulting from such situations could be enumerated at length.

D. The Intent and Purpose of the Act Would Be Defeated by the Lower Court's Decision

Turning to the evil resulting from an affirmance of the decision below, we submit that the intent and purpose of the Act would be defeated by such a construction—in that, the majority of the employees and/or the collective bargaining agent and/or the employers would have a common interest in bringing about the discharge of veterans after a year, in order to prevent inequality and injustice among the workmen of a plant should the veteran contend for such a fixed seniority. Certainly there is nothing in the Act, nor has it ever been contended, that the employer could not discharge a veteran after one year. The Solicitor General, in his Memorandum, on page 8, points out how this not only could happen but has almost happened. The union here demanded that Whirls be discharged after he was expelled from the union. The union served notice on Trailmobile that unless Whirls was discharged, the employee-members (about 1,400, being all of the employees of the plant) would strike. In order to prevent a strike, the company was forced to give Whirls a leave of absence with full pay, which condition continues, and will continue until a final determination of this case.

IX. CONCLUSION

We submit that the benefits conferred upon Whirls under the Act were fully complied with because he was restored to his former position upon his discharge from the Army. He was given the seniority, status, and pay he would have had if he had not gone into the military service. These benefits were given to him for a period of more than one year after his reemployment. To fix seniority as of date of induction for "as long as the veteran continues in the service of the employer and as long as the Act remains in effect" would result in chaotic labor conditions, and would defeat the intent and purpose of the Act because the veteran might have to be discharged after his one year of reemployment.

It is respectfully submitted that the construction of Section 8 contended for by Petitioners is consistent with the language of the Act, consistent with its legislative history, and the decision in the *Fishgold* case, and consistent with principles of justice and fair play, both as regards returning veterans, non-veteran workers, and employers, and that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

MORISON R. WAITE,
PHILIP J. SCHNEIDER,
1318 Union Central Life Bldg.,
Cincinnati 2, Ohio.
Counsel for Petitioner,
THE TRAILMOBILE COMPANY

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WAITE, SCHNEIDER & BAYLESS,
HERMAN A. BAYLESS,
HERBERT SHAFFER,
JOHN R. JOHNSTON,
1318 Union Central Life Bldg.,
Cincinnati 2, Ohio,
Of Counsel for THE TRAILMOBILE COMPANY, *Petitioner.*

APPENDIX A

U. S. C. A. TITLE 50, APP. § 308. As amended Dec. 8, 1944, c. 548, § 1, 58 Stat. 798.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

U. S. C. A. TITLE 50, § 308. As amended July 28, 1942, c. 529, § 2, 56 Stat. 724.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military

service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration.